

EXHIBIT 5

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

THE CHARITABLE DAF FUND, LP.,

§

Plaintiff,

§

v.

§

Cause No. _____

**HIGHLAND CAPITAL MANAGEMENT,
L.P.,**

§

Defendant.

§

ORIGINAL COMPLAINT

This matter concerns self-dealing and seeks redress for violation of state and federal law, including, but not limited to, violations of the Advisers Act of 1940, and other state causes of action.

I.

PARTIES

1. Plaintiff The Charitable DAF Fund, L.P. (“Plaintiff” or “DAF”) is a limited partnership formed under the laws of the Cayman Islands.

2. Defendant Highland Capital Management L.P. (“Highland” or “HCMLP”) is a Delaware limited partnership, whose principal place of business is in Dallas, Texas, at 300 Crescent Court, Suite 700, Dallas, Texas 75201.

II.

JURISDICTION AND VENUE

3. Subject matter jurisdiction is proper in this Court under 28 U.S.C. § 1331 and under 28 U.S.C. § 1334 because the suit arises out of post-petition acts or omissions of the debtor and certain of its principals.

4. This Court has personal jurisdiction over Defendant Highland Capital Management, L.P. because it has continuously done business in this state, and the causes of action arise from the acts or omissions committed in this state.

5. Venue is proper in this Court because a substantial number of the acts or omissions giving rise to this lawsuit and the causes of action asserted herein occurred in Dallas County.

III.

FACTUAL BACKGROUND

6. HCMLP is a registered investment advisor (“RIA”) subject to the regulations of the Securities Exchange Commission.

7. HCMLP is both the advisor of and investor in Highland Multi Strategy Credit Fund, L.P. (“Multistrat”), a Delaware limited partnership. Highland Multi Strategy Credit Fund GP, L.P., itself a Delaware limited partnership, is the general partner of Multistrat, and HCMLP is the sole member of the general partner of Highland Multi Strategy Credit Fund GP, L.P.

8. HCMLP’s advisory capacity is governed, or at all relevant times was governed, by the Third Amended and Restated Investment Management Agreement, effective November 1, 2013 (the “IMA”).

9. The purpose of Multistrat as a vehicle was stated as such: “The Fund's investment objective is to seek attractive risk-adjusted returns, consistent with the preservation of capital and prudent investment management.”

10. The Confidential Private Placement Memorandum for Multistrat disclosed that “[t]he Investment Manager is registered as an investment adviser with the Securities and Exchange Commission under the U.S. Investment Advisers Act of 1940, as amended (the ‘Advisers Act’).

Each prospective investor will be required to make a representation to indicate that it is a ‘qualified client’ as defined in the Advisers Act.”

11. Because of these agreements and roles as the General Partner and RIA, Highland owed contractual and fiduciary duties to Plaintiff as an investor in Multistrat.

12. James Seery, the principal, CEO, and CRO of HCMLP, in its capacity as a debtor, admitted under oath that HCMLP owes fiduciary duties to the investors of the funds HCMLP manages—which would include Multistrat—and therefore, has admitted under oath that HCMLP and its governed persons owe fiduciary duties to the investors in Multistrat, which include Plaintiff, The Charitable DAF Fund, and Highland Capital Management Services, Inc., among others.

13. As an investment vehicle advised at all times and controlled at all times by HCMLP, Multistrat purchased and owned a pool of viaticals—investments in life insurance policies keyed to the lives of other persons. When a person passes away, the life insurance money is paid to the owner of the policy—in this case, Multistrat.

14. The notional value of the viatical pool was approximately \$145 million.

15. In or around August 2020, HCMLP sold the entire viatical pool for approximately \$35,000,000—less than one quarter of the insured value.

16. The policies insured people aged 90 on average, suggesting that the policies were highly likely to pay off in the ensuing few years given the age and life expectancies of the insureds, as well as considering the actuarial impact of the COVID pandemic.

17. In the spring of 2020, Multistrat raised funds specifically for the purpose of paying the premiums on the viatical pool—amounts raised, borrowing availability, and liquid securities provided enough cash to pay the premiums. But HCMLP did not pursue this path as promised.

Instead, it sold the assets. To this day, it is unclear why the policies were sold, and why, just prior to a planned mediation.

18. Furthermore, the process of selling was severely flawed. For example, the health assessments used to determine the likelihood and timeline for the payout were two years old. HCMLP did not cause new, up-to-date health assessments to be performed, and instead was content to rely on stale information or worse, no information at all.

19. Furthermore, HCMLP made no effort to adjust the projected life expectancies due to the increasing age of the insureds during a process that stretched over seven months, nor for the potential impact of COVID on people over the age of 90, which would have impacted the price..

20. Equally troubling is that Multistrat obtained the funds to pay the premiums from another investor—yet, it apparently did not use the funds for that purpose.

21. HCMLP apparently used the proceeds of the sale to pay itself, notwithstanding the fact that there were redeemed interests waiting to be paid—interests to whom HCMLP also owed fiduciary duties.

22. In short, HCMLP caused Multistrat to sell the viatical pool at a substantially discounted amount to curry favor with the brokers and buyers in the marketplace for no apparent benefit to Multistrat's investors or the debtor's estate.

III.

CAUSES OF ACTION

First Cause of Action **Breach of the Advisers Act**

- 23.** Plaintiff incorporates the foregoing allegations as if fully set forth herein.
- 24.** Highland's actions violate the Advisers Act.
- 25.** As an RIA, HCMLP is subject to the Investment Advisers Act of 1940.

26. The IMA imposes and incorporates the duties and obligations of the Investment Advisers Act of 1940.

27. Under this federal law, an investment adviser is a fiduciary.¹ This includes a duty of care, a duty of loyalty, and a duty to refrain from engaging in transactions in which it is not a disinterested person.

28. The duty of loyalty imposed by the Advisers Act of 1940 is not specifically defined in the Advisers Act or in Commission rules but reflects a Congressional recognition “of the delicate fiduciary nature of an investment advisory relationship” as well as a Congressional intent to “eliminate, or at least to expose, all conflicts of interest which might incline an investment adviser—consciously or unconsciously—to render advice which was not disinterested.”

29. To meet its duty of loyalty, an adviser must make full and fair disclosure to its clients of all material facts relating to the advisory relationship, including disclosing transactions in which the advisor has an interest, and to disclose all pertinent facts of a transaction that could affect the client or the client’s interest.² In order for disclosure to be full and fair, it should be sufficiently specific so that a client is able to understand the material fact or conflict of interest and make an informed decision whether to provide consent.

¹ SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 194 (1963). Santa Fe Indus. v. Green, 430 U.S. 462, 471, n.11 (1977) (in discussing SEC v. Capital Gains, stating that the Supreme Court’s “references to fraud in the “equitable” sense of the term was “premised on its recognition that Congress intended the Investment Advisers Act to establish federal fiduciary standards for investment advisers”); Investment Advisers Act Release No. 3060 (July 28, 2010) (“Under the Advisers Act, an adviser is a fiduciary whose duty is to serve the best interests of its clients, which includes an obligation not to subrogate clients’ interests to its own,” citing *Proxy Voting by Investment Advisers*, Investment Advisers Act Release No. 2106 (Jan. 31, 2003) (“Investment Advisers Act Release 2106”)).

² SEC v. Capital Gains, supra, at 200 (“Failure to disclose material facts must be deemed fraud or deceit within its intended meaning.”). Investment Advisers Act Release 3060, supra, footnote 15 (“as a fiduciary, an adviser has an ongoing obligation to inform its clients of any material information that could affect the advisory relationship”); see also General Instruction 3 to Part 2 of Form ADV (“Under federal and state law, you are a fiduciary and must make full disclosure to your clients of all material facts relating to the advisory relationship.”).

30. This fiduciary duty also requires an adviser “to adopt the principal’s goals, objectives, or ends.” This means the adviser must, at all times, serve the best interest of its client and not subordinate its client’s interest to its own. In other words, the investment adviser cannot place its own interests ahead of the interests of its client and must at all times act for the interests of its investors.³

31. Here, the goals of Multistrat included “to seek attractive risk adjusted returns, consistent with the preservation of capital and prudent investment management.”

32. The duty of care includes, among other things: (i) the duty to provide advice that is in the best interest of the client, (ii) the duty to seek best execution of a client’s transactions where the adviser has the responsibility to select broker-dealers to execute client trades, and (iii) the duty to provide advice and monitoring over the course of the relationship.

33. These fiduciary duties are **unwaivable**, and any agreement made in derogation of the obligations under the Advisers Act is **void**.

34. Therefore, Plaintiff seeks to declare the sale of the viaticals void because they were accomplished in violation of the Advisers Act.

35. Plaintiff further seeks to declare the agreement(s) between Highland and Multistrat void because they were continued in violation of the Advisers Act.

Second Cause of Action
Breach of Fiduciary Duty

36. Plaintiff incorporates the foregoing allegations as if fully set forth herein.

³ Investment Advisers Act Release 3060 (adopting amendments to Form ADV and stating that “[u]nder the Advisers Act, an adviser is a fiduciary whose duty is to serve the best interests of its clients, which includes an obligation not to subrogate clients’ interests to its own,” citing Investment Advisers Act Release 2106, supra footnote 15). *SEC v. Tambone*, 550 F.3d 106, 146 (1st Cir. 2008) (“Section 206 imposes a fiduciary duty on investment advisers to act at all times in the best interest of the fund...”); *Sec. & Exch. Commission v. Moran*, 944 F. Supp. 286, 297 (S.D.N.Y 1996) (“Investment advisers are entrusted with the responsibility and duty to act in the best interest of their clients.”).

37. As an RIA, HCMLP is subject to the Investment Advisers Act of 1940.

38. The IMA imposes and incorporates the duties and obligations of the Investment Advisers Act of 1940.

39. Under this federal law, an investment adviser is a fiduciary.⁴ This includes a duty of care, a duty of loyalty, and a duty to refrain from engaging in transactions in which it is not a disinterested person.

40. The duty of loyalty imposed by the Advisers Act of 1940 is not specifically defined in the Advisers Act or in Commission rules, but reflects a Congressional recognition “of the delicate fiduciary nature of an investment advisory relationship” as well as a Congressional intent to “eliminate, or at least to expose, all conflicts of interest which might incline an investment adviser—consciously or unconsciously—to render advice which was not disinterested.”

41. To meet its duty of loyalty, an adviser must make full and fair disclosure to its clients of all material facts relating to the advisory relationship, including disclosing transactions in which the advisor has an interest, and to disclose all pertinent facts of a transaction that could affect the client or the client’s interest.⁵ In order for disclosure to be full and fair, it should be

⁴ SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 194 (1963). Santa Fe Indus. v. Green, 430 U.S. 462, 471, n.11 (1977) (in discussing SEC v. Capital Gains, stating that the Supreme Court’s reference to fraud in the “equitable” sense of the term was “premised on its recognition that Congress intended the Investment Advisers Act to establish federal fiduciary standards for investment advisers”); Investment Advisers Act Release No. 3060 (July 28, 2010) (“Under the Advisers Act, an adviser is a fiduciary whose duty is to serve the best interests of its clients, which includes an obligation not to subrogate clients’ interests to its own,” citing *Proxy Voting by Investment Advisers*, Investment Advisers Act Release No. IA2106 (Jan. 31, 2003) (“Investment Advisers Act Release 2106”)).

⁵ SEC v. Capital Gains, supra, at 200 (“Failure to disclose material facts must be deemed fraud or deceit within its intended meaning.”). Investment Advisers Act Release 3060, supra, footnote 15 (“as a fiduciary, an adviser has an ongoing obligation to inform its clients of any material information that could affect the advisory relationship”); see also General Instruction 3 to Part 2 of Form ADV (“Under federal and state law, you are a fiduciary and must make full disclosure to your clients of all material facts relating to the advisory relationship.”).

sufficiently specific so that a client is able to understand the material fact or conflict of interest and make an informed decision whether to provide consent.

42. This fiduciary duty also requires an adviser “to adopt the principal’s goals, objectives, or ends.” This means the adviser must, at all times, serve the best interest of its client and not subordinate its client’s interest to its own. In other words, the investment adviser cannot place its own interests ahead of the interests of its client and must at all times act for the interests of its investors.⁶

43. Here, the goals of Multistrat included “to seek attractive risk adjusted returns, consistent with the preservation of capital and prudent investment management.”

44. The duty of care includes, among other things: (i) the duty to provide advice that is in the best interest of the client, (ii) the duty to seek best execution of a client’s transactions where the adviser has the responsibility to select broker-dealers to execute client trades, and (iii) the duty to provide advice and monitoring over the course of the relationship.

45. These fiduciary duties are **unwaivable**, and any agreement made in derogation of the obligations under the Advisers Act is **void**.

46. HCMLP’s CEO testified under oath that he and HCMLP were aware of these duties and had to comply with them.

47. Section 204 of the Advisers Act requires HCMLP to carry written policies and procedures that must be followed in order to adhere to its federal obligations.

⁶ Investment Advisers Act Release 3060 (adopting amendments to Form ADV and stating that “[u]nder the Advisers Act, an adviser is a fiduciary whose duty is to serve the best interests of its clients, which includes an obligation not to subrogate clients’ interests to its own,” citing Investment Advisers Act Release 2106, supra footnote 15). *SEC v. Tambone*, 550 F.3d 106, 146 (1st Cir. 2008) (“Section 206 imposes a fiduciary duty on investment advisers to act at all times in the best interest of the fund...”); *SEC v. Moran*, 944 F. Supp. 286, 297 (S.D.N.Y 1996) (“Investment advisers are entrusted with the responsibility and duty to act in the best interest of their clients.”).

48. Section 206 of the Advisers Act prohibits transactions by an adviser that were accomplished via a “deceit” on a client or prospective client, e.g., by concealing the role and interest the adviser has in the transaction, or via engaging in a course of conduct that has a tendency to mislead a client or which is manipulative.

49. These breaches include, but are not limited to (1) selling the viatical pool at a distressed price when it was not in distress and there was no need for Multistrat to sell; (2) concealing the information about the transaction from the Plaintiff; (3) failing to advise the Plaintiff of the opportunity to purchase the viatical pool—especially when it knew the Plaintiff had an interest in the pool and had the means of purchasing it for more cash than \$35 million; (4) concealing the purpose behind the sale of the viatical pool and the conflicts of interest that inhere in the transaction; (5) causing the viatical pool to be sold in a manner that violated the rights of the Plaintiff as an investor in Multistrat (e.g., by failing to conduct an auction, obtaining competitive bids and taking the pool to market); and (6) utilizing the sale proceeds for its own ends—namely, to enrich itself.

50. The Advisers Act declares any contract that was made in violation of its provisions or regulations, or any contract that has been performed in violation of the Advisors Act, **void**.

51. The Advisers Act created a private right of action to void unlawful agreements and acts and to seek such equitable relief as accompanies such claims.

52. Texas law allows a fiduciary plaintiff to seek damages for breaches of fiduciary duty and to seek disgorgement of all ill-gotten gains obtained by a fiduciary.

53. Plaintiff has been damaged due to the breaches of fiduciary duty outlined herein, and it is entitled to recover damages, punitive damages, and attorneys’ fees.

54. To the extent this claim must be brought as a derivative action, it is plain that the demand requirement under Delaware law could not be met because serving a demand on Highland or to sue Highland would have been futile.

Third Cause of Action
Breach of Contract

55. Plaintiff incorporates the foregoing allegations as if fully set forth herein.

56. The IMA imposes a duty of prudent investment management for the benefit of the investors in Multistrat and incorporate the duties and obligations of the Investment Advisers Act of 1940.

57. The violations set forth above constitute a breach of each or both of these agreements.

58. These breaches include, but are not limited to (1) selling the viatical pool at a distressed price when it was not in distress and there was no need for Multistrat to sell; (2) concealing the information about the transaction from the Plaintiff; (3) failing to advise the Plaintiff of the opportunity to purchase the viatical pool—especially when it knew the Plaintiff had an interest in the pool and had the means of purchasing it for more cash than \$35 million; (4) concealing the purpose behind the sale of the viatical pool and the conflicts of interest that inhere in the transaction; (5) causing the viatical pool to be sold in a manner that violated the rights of the Plaintiff as an investor in Multistrat (e.g., by failing to conduct an auction, obtaining competitive bids, and taking the pool to market); and (6) utilizing the sale proceeds for its own ends—namely, to enrich itself.

59. Plaintiff has been damaged by the breaches of contract outlined herein.

60. Plaintiff is entitled to recover damages and attorneys' fees.

JURY DEMAND AND PRAYER

- 61.** Plaintiff demands trial by jury.
- 62.** Plaintiff respectfully requests judgment and an order:
 - Disgorging all ill-gotten gains in an amount to be determined at trial;
 - Voiding the sale and other relevant agreements herein with HCMLP pursuant to the Advisers Act;
 - Awarding damages in an amount to be determined at trial;
 - Awarding punitive damages in an amount to be determined at trial;
 - Awarding attorneys' fees and costs in an amount to be determined at trial;
 - Awarding all interim and final relief to which Plaintiff is legally or equitably entitled under the facts and circumstances raised herein.

Dated: July 22, 2021

Respectfully submitted,

SBAITI & COMPANY PLLC

/s/ Mazin A. Sbaiti

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